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In the Supreme Court of the United States

OCTOBER TERM

No. 71-1532

JAMES CHONGRIS, et al.,
Petitioners,

vs.

HUGH A. CORRIGAN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENTS IN OPPOSITION.

JOHN T. CORRIGAN
Prosecuting Attorney of
Cuyahoga County, Ohio

A. M. BRAUN
JOHN L. DOWLING
THOMAS P. CYRUS
Assistant Prosecuting Attorneys
Criminal Courts Building
1560 East 21st Street
Cleveland, Ohio 44114
Attorneys for Respondents

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENTS IN OPPOSITION.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

In deciding the instant case, the Ohio Supreme Court reviewed the facts of the case. In the opinion of the Supreme Court of Ohio (see Appendix A-13) the Court states the following:

> "In the instant case, the 'invasion' of the 'superadjacent airspace' has not been shown to have affected either the present use or any reasonably foreseeable use of the land."

The laws and the Constitution of Ohio, provide a complete and adequate remedy for the compensation of owners of private property in case the enforcement of any of the airport zoning regulations would result in the taking of property. The Supreme Court of Ohio so held in Syllabus 2 of its opinion (see Appendix A-2) as follows:

> "2. When it is shown that the enforcement of any airport zoning regulation as to specific property will result in an unconstitutional 'taking' of such property, a court may enjoin the operation of the airport zoning regulation as to such property, or may, whichever is more appropriate under the circumstances, direct the institution of eminent domain proceedings for the purpose of compensating the property owner for such 'taking'."

The evidence supports the findings of the Supreme Court of Ohio, that there was no taking of private property for public use by the Airport Zoning Board of Cuyahoga County, Ohio, and that the Chongrises, petitioners herein, were not deprived of the use and enjoyment of their property whatsoever. (See Ohio Supreme Court Opinion, Appendix A-7.)

In the case of *Garner v. State of Louisiana*, La. 1961, 82 S. Ct. 248, 368 U.S. 157, 7 L. Ed. 2d. 207, the Supreme Court of the United States stated the following:

> "United States Supreme Court is bound by a state's interpretation of its own statute and will not substitute its judgment for that of the state's when it becomes necessary to analyze evidence for purpose of determining whether that evidence supports findings of state court."

Accordingly, we contend that in the instant case, this court is bound by the Supreme Court of Ohio in its interpretation of the Ohio statute and the evidence and may not substitute its judgment for that of the Ohio Supreme Court.

QUESTIONS PRESENTED

1. Does Chapter 4563 of the Revised Code of Ohio, *per se,* violate the Fourteenth and Fifth Amendments of the Constitution of the United States, when sections of said Chapter 4563 authorize the creation of Airport Zoning Boards and empower said Airport Zoning Boards to adopt Airport Zoning Regulations imposing certain restrictions upon the height of structures and natural growth in an area designated as "Airport Hazard Area"?

2. Do Airport Zoning Regulations adopted by a County Airport Zoning Board pursuant to the provisions of Chapter 4563 of the Revised Code of Ohio, *per se,* violate the Fourteenth and Fifth Amendments of the Constitution of the United States, when the facts of the case clearly establish that there has been no immediate or direct interference with the use and enjoyment by the owners of private property located in the area designated as "Airport Hazard Area"?

STATEMENT OF THE CASE

In November, 1968, the Village of Willoughby Hills (now City), a municipal corporation, filed an action in the Common Pleas Court of Lake County, Ohio, entitled "Petition for Declaratory Judgment, Injunction and other Equitable Relief." The Plaintiff Village alleged that Chapter 4563 of the Revised Code of Ohio, and the Airport Zoning Regulations adopted by the Cuyahoga County Airport Zoning Board pursuant to the authority of said Chapter, were in violation of Article XVIII, Section 3, of the Ohio Constitution. The question of violation of the Federal Constitution was not raised in the original petition of the Plaintiff Village. In the said original action, the Plaintiff Village further alleged that the Airport Zoning Regulations adopted by the Cuyahoga County Airport Zoning Board

were null and void because they purported to regulate the territory of the Plaintiff Village, and, that as a consequence, the said Village had been damaged and its constitutional rights to enact and enforce zoning regulations within its territorial limits had been infringed upon and would be infringed upon unless the defendants were restrained by a Court Order.

The defendants filed their joint motion to make the petition definite and certain and the trial court granted defendant's motion in part, granting also leave to the Plaintiff Village to amend its petition. Pursuant to the order of the Common Pleas Court of Lake County, the Village of Willoughby Hills, *the only Plaintiff in the original petition,* filed an amended petition and joined thereto as party plaintiffs, James A. Chongris, Bessie Chongris, Anton J. Oblak and Mildred F. Oblak, owners of real estate located within the territory of the said Village of Willoughby Hills.

In the amended petition, Plaintiff Village alleged that it had been damaged as it could not properly plan and zone portions of the area within its territory which had been defined as "Airport Hazard Area" and had been subject to the Zoning Regulations which had been adopted by the Cuyahoga County Airport Zoning Board. Plaintiff Village further alleged that the Zoning Regulations adopted by the Airport Zoning Board were causing the property values of real property within the area alleged to be subject to the jurisdiction of the defendants to be depressed, with a resulting loss of tax revenues of said Plaintiff Village. Plaintiffs James A. and Bessie Chongris and Anton J. and Mildred F. Oblak alleged that their respective properties suffered a diminution in value.

During trial, plaintiffs Anton J. and Mildred F. Oblak were voluntarily dismissed. The trial Court, considering the evidence adduced at the trial, found that there was no

evidence to support the contention of the plaintiffs Chongris that their property had suffered an impairment of use or a diminution in value by reason of the enactment and enforcement of the Cuyahoga County Airport Zoning Regulations. (See Appendix, A-34.) Furthermore, as to Plaintiff Village of Willoughby Hills, the trial Court found that there was no evidence of interference with the right of the Village of Willoughby Hills under Article XVIII, Section 3, Ohio Constitution, to control development of the land, and to adopt regulations within its jurisdiction. (See Appendix, A-34.)

The trial Court also held that "Chapter 4563, Ohio Revised Code, is a constitutional exercise of State Legislative authority; further that these airport zoning regulations are constitutionally enacted in compliance with the statutes, because they impose reasonable restrictions on the use of private land, in general, within the perimeter of the Airport Hazard Area, for special use in the public interest." The trial Court found that "the regulations complement without nullifying the municipal zoning regulations operating in the same area." (See Appendix A-36.)

The Court of Appeals, Eleventh Appellate District, Lake County, Ohio, reversed the Common Pleas Court and found, without any supporting evidence, that Section 4563.03 of the Revised Code of Ohio, which creates the power of an Airport Zoning Board to regulate and restrict land uses and the height of structures and natural growth, *per se*, constitutes a taking of a property interest without due process of law and the statute creating these powers and the regulations issued pursuant thereto to be unconstitutional, being in violation of the due process clauses of the Constitutions of the United States and Ohio. (See Appendix, A-28, 29.)

The Supreme Court of Ohio reversed the Court of Appeals of the Eleventh Appellate District and held that

the provisions of Ohio Revised Code, Chapter 4563, to the extent that they authorize the adoption and enforcement of airport zoning regulations within the territory of a municipal corporation, are not unconstitutional and that "Airport Zoning regulations, adopted in accordance with the provisions of R.C. Chapter 4563 and designed to reduce 'airport hazards' may constitutionally be adopted as an exercise of the 'police power' of the State of Ohio, if such regulations are reasonably necessary to insure the safety of aircraft in landing and taking off and the safety of persons occupying or using the area and the security of property thereon." (The Opinion of the Supreme Court of Ohio, filed on February 2, 1972 and reported at 29 Ohio St. 2d. 39. (Appendix A-1 thru A-16.)

THE FACTS

Cuyahoga County of the State of Ohio owns and operates an airport which is located in the City of Richmond Heights and the Village of Highland Heights located in Cuyahoga County, Ohio, and within a portion of the Village of Willoughby Hills (now City of Willoughby Hills), located in Lake County, Ohio.

On or about April 13, 1963, the Board of County Commissioners of Cuyahoga County, Ohio and the Board of County Commissioners of Lake County, Ohio, formed, pursuant to the provisions of Chapter 4563 of the Revised Code of Ohio, an Airport Zoning Board entitled "Cuyahoga County Airport Zoning Board." This Board appointed, as authorized by Chapter 4563 of the Revised Code of Ohio, an Airport Zoning Commission for the purpose of recommending the boundaries of the various zones to be established and the regulations to be adopted therefor. The Zoning Commission, pursuant to its appointment, made its study and held public hearings before its final recom-

mendation of the Airport Zoning Regulations to the Airport Zoning Board, which adopted the same on or about December 5, 1963 (Appendix, A-70). The Airport Zoning Regulations adopted defined certain area in the vicinity of the airport as "Airport Hazard Area" (Appendix, A-56) and imposed certain restrictions pertaining to the height of structures and of natural growth located within the area designed as "Airport Hazard Area" (Appendix, A-61).

The Airport Zoning Regulations provided, inter alia, *for variances, judicial reviews and changes* (Appendix, A-66, A-67) upon the written application of any affected taxpayer or political subdivision located within the "Airport Hazard Area."

Pursuant to the action for "declaratory judgment, injunction and other equitable relief" in the Court of Common Pleas of Lake County, Ohio, the case was tried before the Honorable Robert Simmons, Judge of the Common Pleas Court of Lake County, Ohio, who, upon the application of the Plaintiffs, made findings of fact and conclusions of law attached hereto and marked Respondent's Appendix 1. As already heretofore stated, the Supreme Court of Ohio sustained the judgment of the trial court.

ARGUMENT

1. Does Chapter 4563 of the Revised Code of Ohio, per se, violate the Fourteenth and Fifth Amendments of the Constitution of the United States, when sections of said Chapter 4563 authorize the creation of Airport Zoning Boards and empower said Airport Zoning Boards to adopt Airport Zoning Regulations imposing certain restrictions upon the height of structures and natural growth in an area designated as "Airport Hazard Area"?

At the outset of this argument it must be pointed out to this honorable Court that the title of the case on the Petition for the Writ of Certiorari is *James Chongris, et al. v. Hugh Corrigan, et al.* In the Supreme Court of Ohio (Appendix, A-1), the title of the case is *Village of Willoughby Hills, et al. v. Hugh A. Corrigan, et al.* This same title appeared in the lower courts (Appendix, A-17, A-30). The reason for the change in the title of the case in this court becomes apparent from a reading of the petition for the writ of certiorari. In the state courts, one of the main contentions for the unconstitutionality of Chapter 4563 of the Revised Code of Ohio was that it conflicted with the "Home rule" powers of the Village of Willoughby Hills, a municipal corporation under Section 3, Article XVIII of the Ohio Constitution (Appendix, A-40). In this petition for the writ of certiorari, it appears that this contention is not raised or pursued and the emphasis in support of the allowance of the writ has been shifted entirely to whether Chapter 4563 of the Revised Code of Ohio and the Regulations adopted pursuant thereto constitute a "taking" of Chongrises' property and are, therefore, unconstitutional. The Supreme Court of Ohio held there was no violation of the "home rule" powers of the Village of Willoughby Hills and that there was no "taking" of Chongrises' property.

In support of granting the writ, petitioner argues that the Supreme Court of Ohio did not comply with the rule of law as pronounced by this Court in *The United States v. Causby,* 328 U.S. 256 (1946) and *Griggs v. County of Allegheny,* 369 U.S. 84 (1962) cases, but that instead, the Supreme Court of Ohio has approved a scheme, the practical effect of which is to authorize the State of Ohio an action which the State of Pennsylvania was denied by the ruling of this Court in the *Griggs* case.

A careful reading, however, of the opinion of the Supreme Court of Ohio, clearly shows that the Court considered both the *Causby* and *Griggs* cases, in reaching its decision. The Supreme Court of Ohio states that in reviewing the facts of the instant case it found that there was no claim made of frequent low flights over Chongrises' land as was involved in the *Causby* and *Griggs* cases, and that the *Causby* and *Griggs* cases were premised upon the actual invasion of the airspace above the land by frequent and low flights. The Supreme Court of Ohio further stated that the same situation existed in the case of *State, ex rel. Royal v. Columbus* (1965), 3 Ohio St. 2d. 154. The syllabus in that case reads:

> "There exists a 'taking' in a constitutional sense of private property for public use under Section 19, Article I of the Ohio Constitution, whenever airflights are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of land."

The Supreme Court of Ohio reaffirmed this principle of law as it is clearly shown in the second syllabus of its opinion which provides for injunctive relief and proceedings in Eminent Domain in case the enforcement of the Airport Zoning Regulations would result in an unconstitutional "taking" of Chongrises' property. However, the Supreme Court found that this principle had no application to the facts of this case.

In considering the allegation of the Chongrises that their property suffered a diminution of value because of enactment and enforcement of the Cuyahoga County Airport Regulations, the Common Pleas Court stated the following in its opinion:

> "As for Chongris, the opinion of their expert regarding a land value impairment was extremely speculative. Even so, I choose to admit it into evidence. Yet it is too nebulous to carry weight. No dollar value was assigned to it. Is it a $10.00 impairment, $100.00 or $1000.00? Their present use and enjoyment of the land is in no way affected by either airport operations or zoning. They do not complain of overflights. Some trees exceed the height limitation, but they are exempt as non-conforming growth and no one has threatened to top them.
>
> "Plaintiffs say they want to install a TV tower and believe they cannot do so because of height restrictions. But they have not applied for a permit. And if they do apply, one must be granted for there is 70 feet of air space available for it." (Appendix, A-34.)

The foregoing findings of the Common Pleas Court of Lake County, Ohio show that the Chongrises were not deprived of the use of their property because of the enforcement of the Cuyahoga County Airport Zoning Regulations.

Absent, therefore, *of facts*, to support their contention of "taking" of their property, the only basis of their action is that the enactment of Chapter 4563 of the Revised Code of Ohio, and the Zoning Regulations adopted pursuant to the provisions of said Chapter constitute a *per se* violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. The petitioners ignore the existence of provisions of the Constitution of Ohio, and the laws enacted under its authority involving the issue of "taking" private property for public use. It is clear that

both the Constitution and the laws of Ohio do afford the Chongrises a complete and adequate remedy at law and that their rights under the Fifth and Fourteenth Amendments have not been violated. Therefore, the petition for a writ of certiorari must be denied by this Court.

2. Do Airport Zoning Regulations adopted by a County Airport Zoning Board pursuant to the provisions of Chapter 4563 of the Revised Code of Ohio, per se, violate the Fourteenth and Fifth Amendments of the Constitution of the United States, when the facts of the case clearly establish that there has been no immediate or direct interference with the use and enjoyment by the owners of private property located in the area designated as "Airport Hazard Area"?

The Legislature of Ohio, cognizant of the fact that the airplane and the airports are a part of modern environment and have become the main means of passenger transportation in the Country and the State of Ohio, enacted Chapter 4563 of the Revised Code of Ohio entitled "Airports" in order to provide for the safety of the persons who fly the airplanes, the persons who operate and maintain the airplanes and the persons who reside in the vicinity of the airports. In order to carry out this purpose, the Legislature authorized within the provision of Chapter 4563, Revised Code of Ohio, the creation of Airport Zoning Boards and granted them legislative authority to adopt, administer and enforce certain zoning regulations pertaining to areas designated by the said Airport Zoning Boards as "Airport Hazard Areas." That the concern of the Legislature was the safety of the people residing in the vicinity of the airports is manifested by the subheading of Chapter 4563, Revised Code of Ohio, entitled "Safety of persons near airports; airport zoning." (Appendix, A-40.)

The petitioner contends that the regulations adopted by the Cuyahoga County Airport Zoning Board pursuant to the auhority of Chapter 4563 of the Revised Code of Ohio are unconstitutional and that the Supreme Court of Ohio, in upholding them, has authorized the violation of the Fourteenth and Fifth Amendments of the Constitution of the United States. The petitioner disagrees with the holding of the Supreme Court's decision that the Cuyahoga County Airport Zoning Regulations were constitutionally adopted as an exercise of the "police power" of the State of Ohio. In arriving at its decision, the Supreme Court of Ohio applied the same test which the Supreme Court of the United States had applied in the case of *Village of Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 397, 71 L. Ed. 303, to wit: whether the regulations are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." In the case of *Village of Euclid v. Ambler Realty Company*, the Supreme Court of the United States stated the following:

> "It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a

process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not made, it cannot be said that the landowner has suffered or is threatened with an injury which entitles him to challenge their constitutionality."

Regarding the proposition whether there is a "taking" of property compensable under the law when regulations pertaining to said property are enacted under the exercise of police power, this Court stated the following in the case of *Interstate Ry. Co. v. Commonwealth, etc.*, 207 U.S. 79:

"Though there is unquestionably a 'taking' under the exercise of police power, yet the taking is not such as is inhibited by or as requires compensation under the constitution."

It is clear, and the Supreme Court of Ohio so stated (Appendix, A-10) that the principles stated by the United States Supreme Court in *Euclid v. Ambler Realty Co., supra,* are equally applicable in the instant case.

In the case of *Jones v. City of Portland, Me.*, 1917, 38 S.Ct. 112, 245 U.S. 217, 62 L. Ed. 252, L.R.A. 1918 C, 765 Ann. Cas. 1918 E, 660, the Supreme Court of the United States stated the following in considering state legislation:

"The attitude of this court towards state legislation purporting to be passed in the public interest, and so declared to be by the decision of the court of last resort of the State passing the act, has often been declared. While the ultimate authority to determine the validity of legislation under the Fourteenth Amendment is rested in this court, local conditions are of such varying character that what is or is not a public use in a particular State is manifestly a matter respecting which local authority, legislative and judicial, has

peculiar facilities for securing accurate information. In that view the judgment of the highest court of the State upon what should be deemed a public use in a particular State is entitled to the highest respect."

In the case of *Sayward v. Denny*, Wash, 1895, 15 S.Ct. 777, 158 U.S. 180, 186, 39 L. Ed. 941, 943, the Supreme Court of the United States stated, following the review of decisions of state courts regarding the due process clause:

> "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to review the decision of the state courts upon questions of state law."

In declaring Chapter 4563 of the Revised Code of Ohio and the Cuyahoga County Airport Zoning Regulations valid, the Supreme Court of Ohio applied the rule of law which this honorable Court so clearly stated in the case of *United States v. Causby*, 328 U.S. 256, which reads as follows:

> "The airplane is part of the modern environment of life and the inconvenience which it causes are normally not compensable under the Fifth Amendment. The airplane apart from the immediate reaches above the land is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of land."

In connection with the validity of regulations adopted pursuant to lawful authority, the Supreme Court of Florida stated in the case of *Harrell's Candy Kitchen v. Sarasota Manatee Airport Authority*, (Fla. 1959), 111 So. 2d 439:

> "Zoning regulations duly enacted pursuant to lawful authority are presumptively valid, and burden is upon him attacking such regulations to carry the burden of

both alleging and proving that it is unreasonable and bears no substantial relation to the public health, safety and morals of general welfare."

CONCLUSION

We believe that we have heretofore demonstrated that there was no probative evidence before the trial court of Lake County, Ohio, to support the contention of the Chongrises' allegation that their property rights were taken.

The Eleventh Court of Appeals of Lake County, Ohio reversed the decision of the trial court without supporting evidence, holding that Chapter 4563 of the Revised Code of Ohio and the Cuyahoga County Airport Zoning Regulations constituted a *per se* violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. The Supreme Court of Ohio, in reviewing the evidence and the law reversed the Court of Appeals and held that Chapter 4563 of the Revised Code of Ohio was constitutional and concluded that the Zoning Regulations in question did not take from the plaintiffs Chongris any "airspace" now owned by them (Appendix, A-14).

We submit that the airplane has become the major means of public transportation and that the inconveniences which it causes are not compensable under the Fifth Amendment of the Constitution of the United States.

We believe that we have heretofore shown compelling reasons both under the applicable laws and the facts in the case why this Honorable Court should deny the writ

sought by the petitioners. The decision of the Supreme Court of Ohio should be permitted to stand since it is completely in accord with the opinions of this Court.

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney
of Cuyahoga County, Ohio

A. M. BRAUN
JOHN L. DOWLING
THOMAS P. CYRUS
Assistant Prosecuting Attorneys
Attorneys for Respondents
216-771-0660

APPENDIX 1

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF TRIAL COURT

No. 49495.

IN THE COURT OF COMMON PLEAS
State of Ohio, Lake County, SS:

VILLAGE OF WILLOUGHBY HILLS
A Municipal Corporation, *et al.*,
Plaintiffs,

vs.

HUGH A. CORRIGAN, *et al.*,
Defendants

Pursuant to Section 2315.22 of the Revised Code of Ohio, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT.

1. The Cuyahoga County Airport Zoning Regulations involve in this case the safety of the Aircraft in the air and is intertwined with the safety of persons on the ground.

2. There was no evidence showing that the Village of Willoughby Hills has been hampered or that its interests to develop or control the development of land within its territorial boundaries have been interfered with by the Cuyahoga County Airport Zoning Regulations.

3. The Village of Willoughby Hills chose not to consider zoning changes within the area designated as "Airport Approach Zone" and "transitional" zone.

4. Only one application for an Airport Zoning permit in the Village of Willoughby Hills had been filed with the Zoning Board within the Hazard Area, and that permit was granted.

5. No application for an Airport Zoning permit has been refused in six years.

6. The present use and enjoyment by the Chongris' of their land has not been affected by either the operation of the Airport or by the enactment of the Cuyahoga County Airport Zoning Regulations.

7. The Chongris' did not suffer any loss.

8. Some trees on the Chrongris property exceed the height limitation set forth in the Cuyahoga County Airport Zoning Regulations, but they are exempt as non-conforming growth and no one has threatened to top them.

9. The Chongris say they wanted to install a T.V. Tower but never applied for a permit. If applied for, the permit would have been granted as there is 70 feet of air space available for it.

10. The future use and development of the back land of the Chongris' property for multi-family residential use as claimed, is not prevented by the Cuyahoga County Airport Zoning Regulations. This claim is speculative in the extreme.

CONCLUSIONS OF LAW.

1. Chapter 4563 of the Revised Code of Ohio is a constitutional exercise of state legislative authority and does not violate the Ohio, or the United States Constitution.

2. Chapter 4563 of the Revised Code of Ohio, and the Cuyahoga County Airport Zoning Regulations enacted pursuant thereto, provide for regulations for the operation of public airports and for the safety and the welfare of persons, both above and on the ground, and are, therefore, legitimate matters for state legislation and regulations adopted pursuant thereto.

3. The Cuyahoga County Airport Zoning Regulations impose reasonable restrictions on the private land, and complement without nullifying the Village of Willoughby Hills Municipal Zoning Regulations operating within the perimeter of the Airport Hazard Area, and are constitutionally enacted and in compliance with the statutes of Ohio.

4. Chapter 4563 of the Revised Code of Ohio, and the Cuyahoga County Airport Regulations, enacted pursuant thereto do not interfere with the right of the Village of Willoughby Hills under Article XVIII, 3, Ohio Constitution, to control development of lands and to adopt zoning regulations within its jurisdiction.